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March 6, 2023

By ECF

Hon. Andrew L. Carter
 United States District Court
 Southern District of New York
 40 Foley Square, Room 435
 New York, NY 10007

Re: *Statistica Capital Ltd. et al. v. Signature Bank*, No. 1:23-cv-00993-ALC (S.D.N.Y.)

Dear Judge Carter:

We represent Defendant Signature Bank (“Signature”) and write pursuant to Your Honor’s Individual Rule 2.A to request leave to move to dismiss the putative class action complaint filed by Statistica Capital Ltd. and Statistica Ltd. (collectively, “Statistica”).

Signature is a commercial bank. (Compl. ¶¶ 6, 17.) Among Signature’s offerings is its digital payments platform, Signet, which leverages blockchain technology to enable its commercial clients to make payments to one another in real time. (*Id.* ¶¶ 19–21.)

Statistica is a trading firm and disgruntled former customer of Signature that transferred funds from its Signature accounts to accounts associated with FTX—at the time, one

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of the world’s largest cryptocurrency exchanges. (*Id.* ¶¶ 33, 88, 96, 156–63.) Statistica alleges it was duped by FTX, including its principal, Samuel Bankman-Fried, who allegedly diverted FTX client funds to Alameda Research, another entity he operated, until November 2022, when the fraud unraveled and FTX plunged into bankruptcy. (*See generally id.* ¶¶ 33–111.)

In an attempt to deflect blame from its own poor investment decisions, Statistica alleges that Signature should have suspected FTX’s alleged wrongdoing because FTX was also a Signature customer. Statistica seeks to hold Signature liable for aiding and abetting FTX’s fraud and breach of fiduciary duty on the ground that Signature allowed its customers to transfer funds from their accounts to accounts associated with FTX. But FTX fooled many sophisticated parties, including Statistica, and merely alleging what Signature *should* have known does not begin to meet the requirement to plead *actual knowledge* of FTX’s fraud or breach of fiduciary duty. The law is also clear that merely providing routine banking services, as Signature did here, does not constitute providing substantial assistance to a fraud or breach of fiduciary duty. And finally, because Statistica had a contractual banking relationship with Signature, its quasi-contractual claim for unjust enrichment will not lie. All three of Plaintiffs’ claims therefore should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because Statistica does not “allege sufficient facts, taken as true, to state a plausible claim for relief.” *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013).

Statistica’s Claim for Aiding and Abetting Fraud Fails. To plead, and ultimately prove, that Signature aided and abetted FTX’s alleged fraud, Statistica would have to show, among other things, Signature’s “knowledge of the fraud,” and that Signature “provided substantial assistance to advance the fraud’s commission.” *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006) (quoting *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 252 (S.D.N.Y. 2005)). Statistica has not, and cannot, do so.

Statistica Does Not Allege Signature’s Actual Knowledge. An aiding and abetting claim under New York law requires “actual knowledge” of the underlying fraud. *Id.* at 292. “[C]onstructive knowledge is not sufficient, ‘nor is a lower standard such as recklessness or willful blindness.’” *Berdeaux v. OneCoin Ltd.*, 561 F. Supp. 3d 379, 412 (S.D.N.Y. 2021) (quoting *Heinert v. Bank of Am., N.A.*, 410 F. Supp. 3d 544, 549 (W.D.N.Y 2019)).

Statistica alleges that Signature must have learned about FTX’s and Alameda’s operations through its ordinary-course anti-money-laundering controls, from which Signature allegedly could have inferred that FTX was engaged in fraud. (*See Compl.* ¶¶ 114–54.) Statistica similarly alleges that Signature must have had visibility into the alleged FTX fraud because Signature monitored virtual currency transactions on Signet, and because it employed software to analyze transactions conducted on major blockchains. (*See id.* ¶¶ 166–85.) These allegations simply speculate about what Signature *should* have *inferred* about FTX’s operations; they in no way establish that Signature had *actual knowledge* of FTX’s alleged fraud. Even if this information had given Signature a “strong suspicion of fraud” by FTX (which Statistica has not alleged), “courts have universally deemed [this] inadequate to constitute actual knowledge.” *Berdeaux*, 561 F. Supp. 3d at 414; *see also Zamora v. FIT Int’l Grp. Corp.*, 834 F. App’x 622, 628 (2d Cir. 2020); *Rosner v. Bank of China*, 2008 WL 5416380, at *5–7 (S.D.N.Y. Dec. 18, 2008), *aff’d* 349 F. App’x 637 (2d Cir. 2009).

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Statistica also alleges that Signature personnel had experience in the cryptocurrency industry and should have been aware of “numerous red flags” based on publicly available information about FTX. (*See id.* ¶¶ 188–204.) But it is illogical for Statistica to claim on the one hand that it was utterly unaware of FTX’s alleged fraud, while at the same time asserting that this public information—which was equally available to Statistica—gave Signature actual knowledge of FTX’s alleged misdeeds.

Statistica finally alleges that Signature must have learned of the alleged FTX fraud because Signature received instructions from Statistica to make wire transfers to accounts associated with FTX, and because Statistica used Signet to transfer funds to accounts associated with FTX. (*See ¶¶ Compl. 155–65.*) But merely processing transfers for a customer establishes at most only *constructive* knowledge, not *actual* knowledge, of fraud. *See Ryan v. Hunton & Williams*, 2000 WL 1375265, at *9 (E.D.N.Y. Sept. 20, 2000) (citing *Williams v. Bank Leumi Trust Co.*, 1997 WL 289865 (S.D.N.Y. May 30, 1997)).

Statistica Does Not Allege Signature’s Substantial Assistance. Statistica also cannot show that Signature provided “substantial assistance” to advance the alleged FTX fraud, which requires that “a plaintiff . . . plead facts from which the Court can infer that (1) the defendant affirmatively assisted, helped conceal, or failed to act when required to enable the fraud to proceed; and (2) ‘the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.’” *Berdeaux*, 561 F. Supp. 3d at 416 (quoting *Rosner*, 2008 WL 5416380, at *12).

Statistica alleges that Signature followed Statistica’s (and other customers’) orders to transfer funds from its accounts to accounts associated with FTX, and also allowed certain FTX-associated accounts to transfer funds to other FTX-associated accounts. (Compl. ¶¶ 206–32, 273.) But courts have uniformly held that the mere provision of routine banking services such as account transfers does not constitute substantial assistance, even when the transfers at issue were in some way “atypical” and suggestive of fraud. *See, e.g., Heinert*, 410 F. Supp. 3d at 552 (no substantial assistance where “defendant banks ‘assisted’ the individual defendants by providing banking services, including making wire transfers, opening accounts, and clearing account holds . . . even where they are performed with ‘atypical’ frequency”); *Vasquez v. Hong Kong & Shanghai Banking Corp. Ltd.*, 2019 WL 2327810, at *17–19 (S.D.N.Y. May 30, 2019) (no substantial assistance where bank “received transfers from plaintiffs’ bank(s) and relayed them to” foreign accounts operated by Ponzi scheme); *Rosner*, 2008 WL 5416380, at *12–13 (no substantial assistance where bank allegedly allowed fraudsters “to create accounts, transfer funds among accounts, and make withdrawals from accounts,” even where transactions allegedly were “atypical and non-routine”); *Nigerian Nat’l Petroleum Corp. v. Citibank, N.A.*, 1999 WL 558141, at *2, 8 (S.D.N.Y. July 30, 1999) (no substantial assistance where bank was aware of a potentially fraudulent transfer but did not freeze the account).

Statistica’s Claim for Aiding and Abetting Breach of Fiduciary Duty Fails. For the same reasons, Statistica has not alleged, and cannot prove, that Signature aided and abetted FTX’s alleged breach of fiduciary duty. To plead a claim for aiding and abetting breach of fiduciary duty, a plaintiff must sufficiently allege, among other things, “that the defendant ‘knowingly induced or participated in the breach.’” *Baron v. Galasso*, 83 A.D.3d 626, 629 (2d Dep’t 2011) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep’t 2003)). That requires

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establishing *actual* knowledge of the breach, and, as with a claim of aiding and abetting fraud, “an allegation that the defendant ‘knew or should have known’ about the breach of duty is insufficient to support such a claim.” *Id.* (citing *Kaufman*, 307 A.D.2d at 125; quoting *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 102 (1st Dep’t 2006)). Statistica must also establish substantial assistance. *See id.* (collecting cases). Just as with aiding and abetting fraud, “[t]he provision of routine financial services to a client,” such as a transfer from one account to another, “does not constitute substantial assistance to the breach of the client’s fiduciary duty to another.” *Parklex Associates v. Royal Cap. Mkts. Corp.*, 2012 WL 3590768, at *5 (N.Y. Sup. Ct. Kings Cnty. July 30, 2012), *aff’d*, 118 A.D.3d 972 (2d Dep’t 2014); *see also McBride v. KPMG Int’l*, 135 A.D.3d 576, 579 (1st Dep’t 2016).

Statistica’s Claim for Unjust Enrichment Fails. Statistica’s final claim is equally deficient. “[T]he existence of a valid and enforceable contract precludes an unjust enrichment claim relating to the subject matter of the contract.” *Morgan Stanley & Co. v. Peak Ridge Master SPC Ltd.*, 930 F. Supp. 2d 532, 545–46 (S.D.N.Y. 2013) (collecting cases). Statistica admits it was a customer of Signature (and seeks to represent a class of Signature customers); indeed, transfers from its accounts at Signature to accounts associated with FTX are the entire predicate for its claims. (Compl. ¶¶ 156–64, 261.) “[A] bank account is a contractual right,” *Pereia v. Summit Bank*, 2001 WL 563730, at *13 (S.D.N.Y. May 23, 2001), directly related to the subject matter of the allegations here, *i.e.*, the provision of banking services associated with Plaintiffs’ bank accounts at Signature.

Signature respectfully requests that, following the pre-motion conference, the Court permit Signature to move to dismiss the Complaint on the foregoing grounds. We have agreed with Statistica’s counsel on a briefing schedule should the Court grant leave to file the motion.

Respectfully yours,

/s/ *Elizabeth M. Sacksteder*

Elizabeth M. Sacksteder

cc: All counsel of record (by ECF)